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Financial Information Services v Hj Salleh Hj Janan

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-49-2011(S)
ARIFIN ZAKARIA CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND ABDULL HAMID EMBONG FCJ
25 JUNE 2012

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Tort — Defamation — Qualified privilege — Respondent sued appellant for defamation — High Court held defence of justification established — High Court did not consider alternative defence of qualified privilege — Court of Appeal rejected defence of justification — Court of Appeal rejected defence of qualified privilege based on case of Macintosh and another v Dun and others [1908] AC 390 ('Macintosh v Dun') — Whether decision in Macintosh v Dun defeated defence of qualified privilege where information was supplied by corporate defendant formed solely or substantially for purpose of disseminating commercial and financial information of third party to its members on payment of fees

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Financial Information Services Sdn Bhd ('the appellant') was a private limited company with its principal activity described as 'mainly for the purpose of collecting and circulating to the associations members any commercial, financial and other relevant information pertaining to the business carried on by them'. The appellant had informed Affin-ACF Finance Bhd that the respondent was made a bankrupt twice, in 1981 and 1991. However, it was not disclosed that the two adjudication orders on the respondent had been annulled and rescinded in September 1995 and October 1997 respectively. The respondent alleged that the false information published by the appellant was the cause for the rejection of his loan applications and consequently, the respondent sued the appellant for defamation. The High Court found that defamation had been established but nonetheless dismissed the respondent's claim on the ground that defence of justification had been established. The alternative defence of qualified privilege raised by the appellant was not considered by the learned trial judge. On appeal, the Court of Appeal ('the COA') found that the information published by the appellant was false, as such, the defence of justification was rejected. The COA also found that the appellant was 'nothing more than merely a credit agency which acted for reward' and adopted the principle in the case of *Macintosh and another v Dun and others* [1908] AC 390 ('Macintosh') in rejecting the appellant's defence of qualified privilege. Aggrieved by the COA's decision, the appellant filed the present appeal and the question posed to the Federal Court was 'Whether the decision in *Macintosh and another v Dun and others* [1908] AC 390 defeats the defence of qualified privilege where information is supplied by a corporate

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defendant formed solely or substantially for the purpose of disseminating commercial and financial information of a third party to its members on payment of fees?'. The appellant submitted that the COA was wrong in not following the case of *London Association for Protection of Trade and another v Greenlands, Limited* [1916] 2 AC 15 ('Greenlands'), since that case was diametrically opposed to *Macintosh*.

Held, dismissing the appeal with costs:

(1) The underlying principle enunciated by the case of *Toogood v Spyring* (1834) 1 Cr M & R 181 ('Toogood') was, as observed by Lord Macnaghten in *Macintosh*, that the protection was accorded for the common convenience and welfare of society and not the convenience of an individual or the convenience of a class. Thus, despite the appellant's contention that the company was formed for the common good or benefit of its members, the defamatory publication which formed the subject matter of this suit, would not have fit into the category of being one that was protected because it was not fairly warranted by any reasonable occasion of exigency made for the common convenience and welfare of society ('the *Toogood* test') (see para 19).

(2) The appellant had clearly failed in its duty to use its best endeavours and efforts to ensure the accuracy of the information supplied as it had agreed to do in its agreement with the finance companies. The appellant was reckless in not updating its database. Reckless such as the conduct of the appellant in the present case imputed malice. This malice would have thus rebutted any defence of qualified privilege, even if the appellant was successful in proving its immunity (see paras 29–31 & 34).

(3) The appellant was in the business of selling information and it was nothing more than a credit agency trading for profit. Any communication it made was therefore with a motive of self-interest. Thus, applying the principle found in *Macintosh*, the publication made by the appellant on the respondent could not be clothed with the immunity of qualified privilege. In totality, the court held that the answer to the question posed was in the affirmative, in the circumstances of the case (see paras 27 & 52–53).

(4) The opinion in *Macintosh* was not at variance with that in *Greenlands* or, as mistakenly suggested by the appellant, diametrically opposed to the latter. The same tests for the occasion of qualified privilege as enunciated in *Toogood* were applied in these two cases. At most the facts in Macintosh were distinguished from the facts and circumstances as found in Greenlands. About the test for privilege, there was no divergent opinions in both cases. In fact, *Greenlands* followed *Macintosh* on this aspect. The court therefore held that, *Greenlands* need not be considered at all in view of the different facts in the instant appeal (see paras 50–51).

[Bahasa Malaysia summary

Financial Information Services Sdn Bhd ('perayu') adalah sebuah syarikat sendirian berhad dengan aktiviti utamanya yang digambarkan sebagai 'terutamanya untuk tujuan mengumpul dan mengedarkan kepada ahli-ahli persatuan apa-apa maklumat komersil, kewangan dan lain-lain yang berkaitan dengan perniagaan yang dijalankan oleh mereka'. Perayu telah memaklumkan Affin-ACF Finance Bhd bahawa responden telah menjadi bankrap dua kali, pada tahun 1981 dan 1991. Walau bagaimanapun, perayu tidak mendedahkan bahawa dua perintah adjudikasi terhadap responden telah dimansuhkan dan dibatalkan masing-masing pada bulan September 1995 dan Oktober 1997. Responden mendakwa bahawa maklumat palsu yang diterbitkan oleh perayu adalah punca penolakan permohonan pinjamannya dan akibatnya, responden menyaman perayu atas dakwaan fitnah. Mahkamah Tinggi mendapati bahawa fitnah telah dibuktikan tetapi tetap menolak tuntutan responden atas alasan pembelaan justifikasi adalah terpakai. Pembelaan alternatif perlindungan bersyarat yang dibangkitkan oleh perayu tidak dipertimbangkan oleh hakim bicara yang terpelajar. Di atas rayuan, Mahkamah Rayuan ('MR') mendapati bahawa maklumat yang diterbitkan oleh perayu adalah palsu, oleh itu, pembelaan justifikasi ditolak. Mahkamah Rayuan juga mendapati bahawa perayu adalah 'tidak lebih daripada sekadar agensi kredit yang bertindak untuk ganjaran' dan mengguna pakai prinsip dalam kes *Macintosh and another v Dun and others* [1908] AC 390 ('Macintosh') dalam menolak pembelaan perlindungan bersyarat perayu. Terkilan dengan keputusan MR, perayu memfailkan rayuan semasa dan persoalan yang dikemukakan kepada Mahkamah Persekutuan adalah 'Sama ada keputusan dalam *Macintosh and another v Dun and others* [1908] AC 390 mengatasi pembelaan perlindungan bersyarat di mana maklumat dibekalkan oleh defendan korporat yang dibentuk semata-mata atau sebahagian besarnya untuk tujuan penyebaran maklumat komersil dan kewangan pihak ketiga kepada anggotanya dengan bayaran yuran?'. Perayu berhujah bahawa MR adalah salah apabila gagal mengikuti kes *London Association for Protection of Trade and another v Greenlands, Limited* [1916] 2 AC 15 ('Greenlands'), kerana kes tersebut adalah bertentangan secara keseluruhan dengan kes *Macintosh*.

Diputuskan, menolak rayuan dengan kos:

(1) Prinsip dasar yang diketengahkan oleh kes *Toogood v Spyring* (1834) 1 Cr M & R 181 ('Toogood'), seperti yang diperhatikan oleh Lord Macnaghten dalam *Macintosh*, bahawa perlindungan diberikan untuk kepentingan dan kebajikan bersama masyarakat dan bukannya kepentingan individu atau kelas. Oleh itu, walaupun dakwaan perayu bahawa syarikat perayu dibentuk untuk kepentingan umum atau manfaat ahli-ahlinya, penerbitan fitnah yang membentuk subjek saman ini tidak termasuk dalam kategori yang dilindungi kerana ia tidak dijamin dengan apa-apa keadaan getir yang wajar yang dibuat untuk

kepentingan dan kebajikan masyarakat umum ('ujian *Toogood*') (lihat perenggan 19).

(2) Perayu jelas gagal dalam tugasnya untuk menggunakan usaha terbaik untuk memastikan ketepatan maklumat yang dibekalkan sebagaimana yang telah dipersetujui untuk dilakukan dalam perjanjiannya dengan syarikat-syarikat pembiayaan. Perayu telah bertindak melulu dalam tidak mengemaskini pangkalan datanya. Tindakan melulu seperti tindakan perayu dalam kes ini dianggap sebagai niat jahat. Niat jahat ini akan mengatasi pembelaan perlindungan bersyarat, walaupun perayu berjaya membuktikan kekebalannya (lihat perenggan 29–31 & 34).

(3) Perayu berkecimpung di dalam perniagaan menjual maklumat dan perayu tidak lebih daripada sebuah agensi kredit yang berniaga untuk mendapatkan keuntungan. Apa-apa komunikasi yang dibuat adalah dengan motif kepentingan diri. Oleh itu, dengan mengguna pakai prinsip yang terdapat di dalam kes *Macintosh*, penerbitan yang dibuat oleh perayu berkaitan dengan responden adalah tidak dilindung dengan kekebalan perlindungan bersyarat. Secara keseluruhannya, dalam keadaan kes semasa, mahkamah berpendapat bahawa jawapan kepada persoalan yang dikemukakan adalah afirmatif (lihat perenggan 27 & 52–53).

(4) Pendapat dalam *Macintosh* tidak bertentangan dengan *Greenlands* atau, seperti yang dicadangkan secara salah oleh perayu, bertentangan secara keseluruhan dengan kes *Greenlands*. Ujian yang sama bagi keadaan perlindungan bersyarat seperti yang dinyatakan dalam *Toogood* digunakan dalam kedua-dua kes ini. Jika ada, hanya fakta dalam *Macintosh* yang dibezakan dari fakta dan keadaan yang terdapat di dalam *Greenlands*. Mengenai ujian perlindungan, tidak terdapat pendapat yang berbeza dalam kedua-dua kes. Malah, *Greenlands* mengikuti *Macintosh* dalam aspek ini. Oleh itu mahkamah berpendapat bahawa, *Greenlands* tidak perlu dipertimbangkan sama sekali memandangkan fakta-fakta yang berbeza dalam rayuan semasa (lihat perenggan 49–51).]

Notes

For cases on qualified privilege, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 889–920.

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)
Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya' Kub [2005] 3 MLJ 485, CA (refd)
Davies v Snead (1870) LR 5 QB 608, QBD (refd)
Eng Thye Plantations Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26, CA (refd)
Gillett v Nissen Volkswagen Ltd [1975] 3 WWR 520, SC (refd)

Howe and McColough v Lees [1910] 11 CLR 361, HC (folld)
Hunt v Great Northern Railway Company [1891] 2 QB 189, CA (refd)
London Association for Protection of Trade and another v Greenlands, Limited [1916] 2 AC 15, HL (not folld)
Macintosh and another v Dun and others [1908] AC 390, PC (folld)
R v Woodfall (1774) Lofft 776 (folld)
Rajagopal v Rajan [1972] 1 MLJ 45, FC (refd)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Spring v Guardian Assurance plc and others [1994] 3 All ER 129, HL (refd)
Stuart v Bell [1891] 2 QB 341, CA (refd)
Toogood v Spyring (1834) 1 Cr M & R 181 (refd)
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

Legislation referred to

Bankruptcy Rules 1969
Courts of Judicature Act 1964 s 69(4)

Appeal from: Civil Appeal No S-02–1354 of 2004 (Court of Appeal, Putrajaya)

Colin Lau (Colin Lau & Co) for the appellant.
Edwin Tsen (Tan Pang Tsen & Co) for the respondent.

Abdull Hamid Embong FCJ (delivering judgment of the court):

[1] We took time to consider this question of law now posed to us. The question reads:

> Whether the decision in *Macintosh v Dun* [1908] AC 390 defeats the defence of qualified privilege where information is supplied by a corporate defendant formed solely or substantially for the purpose of disseminating commercial and financial information of a third party to its members on payment of fees?

BACKGROUND FACTS

[2] The appellant, Financial Information Services SB ('FIS') is a private limited company incorporated with its principal activity described as 'mainly for the purpose of collecting and circulating to the associations members any commercial, financial and other relevant information pertaining to the business carried on by them'. It was incorporated by the Association of Finance Companies of Malaysia and the Association of Hire-Purchase Companies of Malaysia (see FIS Directors Report year end 31 December 2002).

A **[3]** It was emphasised by learned counsel for FIS that the company was formed not by members of the public but by two associations providing financial services to the public. On being questioned by this court if it was a company set up for profit, learned counsel gave an assertive 'No' in reply. But learned counsel also admitted that 'fees' are collected by FIS and that it 'also
B made a bit of profit and also retain the profit and all that other things. But these profits go straight to the members. The public has no access to it'. The issue of whether FIS was incorporated with an expectation of making profits is pertinent in our consideration in answering the question posed, as will be seen later in this judgment.

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[4] On 13 March 2000, pursuant to an inquiry by Affin-ACF Finance Bhd, FIS issued what is known as an enquiry details on the respondent. The information given by FIS was on the financial standing of the respondent. FIS informed Affin-ACF that the respondent was made a bankrupt, twice, in 1981
D and 1991. This fact was not denied by the respondent. But what was not disclosed was that the two adjudication orders on the respondent had been annulled and rescinded in September 1995 and October 1997 respectively.

[5] The respondent, a businessman and politician, had unsuccessfully
E applied for a loan from two financial institutions, namely, Affin-ACF Finance Bhd and Arab-Malaysian Finance Bhd. The respondent suspected that the false information published by FIS was the cause for the rejections of his loan applications.

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[6] That failure on the part of FIS to disclose the truth on the respondent's current status, formed the basis of the suit by the respondent who averred in his statement of claim that:

> 4. In their natural and ordinary meaning the said words meant and were understood
G to mean that the Plaintiff was an undischarged bankrupt and that he was not creditworthy and a business failure.
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> 5. By reason of the publication of the said words the Plaintiff has been seriously injured in his character, credit and reputation and has been brought into public scandal, odium and contempt and has suffered loss and damages.

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[7] The High Court found that defamation had been established but nonetheless dismissed the respondent's claim opining that the FIS is 'not liable to the Plaintiff for defamation because what the Defendant (FIS) did was merely to re-state in the Enquiry Details Court Orders which had been
I published in the Daily Express Newspaper and the Gazette'. The learned judicial commissioner accepted the justification defence and reasoned that:

> The Plaintiff has to bear the stigma attached to having been adjudged a bankrupt twice and may even have to endure the lingering damage to his reputation caused by the adjudication orders passed by the Court, long after he has been discharged

because they are part of the Court records and can be published, as it was, in the Enquiry Details. In these circumstances, I hold that the Defendant has succeeded in its plea of justification and accordingly find it unnecessary to consider and determine the Defendant's alternative plea of qualified privilege.

[8] The alternative defence of qualified privilege as stated above, was not considered. The Court of Appeal rejected the contention that the publication was justified since the respondent at the date of the publication of the enquiry details was no longer a bankrupt; and that FIS had been guilty of not reporting on the annulments of the bankruptcies in the column entitled 'Discharge' in the enquiry details, which was a material omission. In short, it was held on appeal that what FIS published was false. We agree with this part of the judgment of the Court of Appeal and will say no more of it. The Court of Appeal also considered the defence of qualified privilege which now forms the crux of this appeal and the basis of the question posed to us. The substantial submission by FIS's counsel before us was on this sole issue.

[9] The Court of Appeal also made a finding of fact that FIS is 'nothing more than merely a credit agency which acted for reward' and adopted the principle in *Macintosh and another v Dun and others* in rejecting its defence of qualified privilege.

[10] Further, the Court of Appeal also found that FIS had not acted bona fide, in failing to take a simple yet necessary effort in asking the office of the Director General of Insolvency on the actual status of the respondent. There was thus, in the opinion of the learned judges below, an element of dishonesty and malice in FIS's reports as it contained half truths. FIS also admitted that it did not update its database, although under the Bankruptcy Rules 1969, the order of rescission and annulment would have been published in the Government *Gazette*, thus making that updating a simple task.

[11] Learned counsel for FIS also submitted that the Court of Appeal had been wrong in importing the law of negligence into the tort of defamation, arguing that the Court of Appeal seemingly considered that FIS was under a duty of care to update the report that it published. To this, the learned Chief Justice and the learned Chief Judge of Sabah and Sarawak remarked respectively that, 'No, there is no duty of care! It is not talking about duty of care. You must publish the correct information. That is all'; and 'And the claim here is not based on negligence. It is based on the publication'.

[12] The tort of protecting reputation of course does not involve the concept of duty of care (see *Spring v Guardian Assurance plc and others* [1994] 3 All ER 129). Thus it was wrong for learned counsel to contend that negligence was considered into this concept in deciding this case. This clearly, was a non-issue.

[13] It was FIS's case that the Court of Appeal had been wrong to rely on the principle of *Macintosh* but should instead have relied on the principle laid down in *London Association for Protection of Trade and another v Greenlands, Limited* [1916] 2 AC 15. Learned counsel also contended that the Court of Appeal had been wrong in concluding that FIS was set up with a view to make profits since the trial court made no such finding.

[14] Learned counsel adverted us to the financial statement of FIS which conclusively showed that it did make profits (of over RM1m in 2001 and 2002) which was partly paid out as dividends to its members and partly ploughed back into FIS for the improvement and development of its business. Learned counsel then made a surprising contention that since the profits are participated in only by the two shareholders and not the public, it has to mean that FIS was not set up as a profit making enterprise. We have to disagree with this.

[15] So, clearly from the documentary evidence itself, the motive of setting up FIS was for profit. This was considered by the Court of Appeal. It was a fact that was established at the trial although not considered by the learned judicial commissioner who opined that there was no necessity for him to consider the defence of qualified privilege; thus this fact was not touched upon in his judgment. Learned counsel for FIS had complained that the Court of Appeal had been wrong in making a primary finding of fact at the appeal stage. We disagree. In our view the factual accounts were available to the Court of Appeal, and in rehearing the appeal, it is not improper for the Court of Appeal to draw whatever inferences of facts and make judgments on them. See s 69(4) of the Courts of Judicature Act 1964 which states:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

The Court of Appeal may, upon reviewing the facts, arrive at a different conclusion on the primary facts as found by the trial court especially where there has been a non appreciation or a misappreciation of those facts by the trial court. This is now trite law (see *Eng Thye Plantations Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26). We found no flaw in the Court of Appeal in considering this fact and making a correct inference that FIS was trading for profit. It was against this factual background that we feel it now necessary to add in the words 'on payment of fees' to the original question posed.

[16] That the publication was obviously defamatory is not in issue. The respondent was described in it as an undischarged bankrupt, meaning he was totally credit-worthless, an imputation obviously injurious to his credit and his

standing in society. It is thus prima facie actionable and FIS cannot escape liability for that publication, unless immuned on the ground of privilege. So the general rule as stated by Lord Mansfield in *R v Woodfall* (1774) Lofft 776 that 'whatever a man publishes, he publishes at his peril' applies.

[17] The thrust of the appellant's appeal was that the publication it made was protected by qualified privilege. Learned counsel submitted that since the publication was made pursuant to a request for information by a subscribing member of FIS, and if thus made bona fide, it is protected. We say that this proposition made by counsel is too broad and does not state the true position of the law on this matter.

[18] The conditions for qualified privilege to arise as a defence was laid out long ago in *Toogood v Spyring* (1834) 1 Cr M & R 181 and from this passage of Baron Parke's which has been described by Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 as having 'been frequently quoted, and always with approval'. That illustrious passage speaking of the publication of statements false in fact and injurious to the character of another states:

> The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If *fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society*; and the law has not restricted the right to make them within any narrow limits. (Emphasis added.)

[19] The underlying principle enunciated by *Toogood* is, as observed by Lord Macnaghten in *Macintosh and another v Dun and others* [1908] AC 390, that the protection is accorded for the common convenience and welfare of society and not the convenience of an individual or the convenience of a class. Thus, despite the contention of learned counsel for FIS that the company was formed for the common good or benefit of its members, the defamatory publication which is now the subject matter of this suit, would not have fit into the category of being one that is protected because it was not fairly warranted by any reasonable occasion of exigency made for the common convenience and welfare of society ('the *Toogood* test').

MACINTOSH V DUN

[20] *Macintosh* applied the principle laid down in *Toogood.* It has been said that in the *Macintosh* decision the Privy Council did not profess to lay down any new law or put the matter of privilege occasions on any new footing (see

Howe and McColough v Lees [1910] 11 CLR 361, in particular the dissenting judgment of Isaacs J), but was in keeping with decided English cases of authority on the matter.

[21] The case also 'applied the well recognised rule of law for ascertaining whether the occasion of a defamatory publication is or is not privileged to the special facts of each case' (per O'Connor J in *Howe and McColough v Lees*)

[22] What was propounded by the Privy Council in this case has been summarised by the author of *Gatley on Libel and Slander* (11th Ed) where at para 14.27 it says that:

> *Credit agencies*. In *Macintosh v Dun*, it was held that where a mercantile agency or trade protection society carries on the business of collecting information as to the credit and financial standing of other persons and supplying such information for reward to any trader who may become a subscriber of the agency or society, the information given to a subscriber, though given bona fide and in answer to a confidential inquiry on his part, is not privilege, for, it was said, it is not in the interests of the community or the welfare of society that: 'the protection which the law throws around communications made in legitimate self-defence or from a bona fide sense of duty should be extended to communications made from motives of self-interest by persons who trade for profit in characters of other people.
>
> *Macintosh v Dun* has been criticized and does not represent the predominant view of the law in the United States, but there does not seem any doubt that it represents English law where credit agencies which act for reward give information in the ordinary course of their business.

[23] It was also applied in Canada (see *Gillett v Nissen Volkswagen Ltd* [1975] 3 WWR 520. It was held in this case that:

> The occasion was privileged if the communication injurious to the plaintiffs' character was made in the general interest of society and from sense of duty; *not so, if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, and who offer for sale information* which, however cautiously and discreetly sought, may have been improperly obtained. (Emphasis added.)

[24] In *Macintosh* the two questions before the trial judge were these:

> 1. Did the defendants in distributing the reports act from a sense of duty or from some indirect or improper motive?
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> 2. Did the defendants distribute the reports recklessly, not caring whether they were true or false?

At first instance it was ruled that the privilege was bad. On appeal the Australian High Court held that the occasion was privileged and judgment was entered for the respondents.

[25] Before the Privy Council the sole question was as stated by Lord Macnaghten in his judgment who said:

> Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people.

[26] In the present appeal the motive of self-interest on the part of FIS, was positively found by the Court of Appeal judges, with whom we agree. The law as explained in *Macintosh* must now be applied to the particular circumstances of this case. To recapitulate, the roles played by FIS, as neatly summarised by learned counsel for the respondent, are as follows:

(a) to collect information on legal actions taken against the public by financial institutions and other parties;

(b) it collected information on legal actions from newspapers, Government *Gazettes*, its association and other sources;

(c) it then enters all these into its database and sells the information to third parties;

(d) it has been making profits averaging over RM1m for 2001 and 2002 (please refer to p 203 of the notice of motion); and

(e) it had fixed deposits of over RM5.7m in 2001 and over RM4.8m in 2002 with financial institutions (please refer to p 234 of the notice of motion). There is *no* evidence of any of the profits being distributed to all its members.

[27] Similar to the defendants in *Macintosh,* FIS here held themselves out as collectors of information about other people which they are willing to disseminate to their customers for a fee. In other words, FIS was in the business of selling information. What then is their motive? Was it a sense of duty to the public? We certainly do not think so. We are of the view that FIS was, as with other credit agencies business, a company carrying out a business with a hope of making a profit. Any communication it made was therefore with a motive of self-interest. Thus applying the principle found in *Macintosh*, the publication made by FIS on the respondent cannot thus be clothed with the immunity of qualified privilege.

[28] Lord Macnaghten in *Macintosh* observed that information such as this may be obtained in many ways. We think that it is worthwhile that we quote this advice of His Lordship who said:

> It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

MALICE

[29] In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, Richard Malanjum J (as the CJ (Sabah and Sarawak) was then) said 'DW5 took no precaution, was reckless and was not concerned with its truth or falsity thereby evidencing malice on his part'. The Court of Appeal affirmed this finding (see *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya' Kub* [2005] 3 MLJ 485). Similarly, FIS had clearly failed in its duty to use its best endeavours and efforts to ensure the accuracy of the information supplied as it had agreed to do in its agreement with the finance companies.

[30] Malice, if proven demolishes the defence of qualified privilege.

Upon a mere publication of a defamatory material, malice which forms its essence, is presumed. Recklessness such as the conduct of FIS in this case imputes malice. We adopt here the view of the learned author of *Gatley on Libel and Slander* (8th Ed) at para 778 which states:

> So where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice.

[31] Now, from the evidence and their own admission, FIS had stated that the source of their information was from the Government *Gazettes*, the Department of Insolvency Malaysia, from the media and records supplied by its members. As earlier stated, the respondent was no longer a bankrupt since 1995 and 1997 respectively with the annulment orders. This fact could have easily been discovered if FIS had exercised a little care and prudence in making inquires and checks from both the Department of Insolvency or from the Government *Gazettes* which is readily available even at the slightest inquiry. In this case the evidence clearly showed that FIS had abstained from making that necessary inquiry. FIS was thus reckless in not updating its database. Being in a business as it was, an updated and current information on a person's status is crucial. We agree with the Court of Appeal that because of this failure FIS had been guilty of being wantonly reckless and of dishonest conduct, and should suffer the consequences of overstepping the law.

[32] As Lord Nicholls stated in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609:

> The classic exposition of malice in this context is that of Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669, [1975] AC 135 at 149. If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. *Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not.* (Emphasis added.)

[33] Or putting it differently and borrowing the words of Wan Hamzah SCJ in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173:

> If the defendant publishes untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false.

[34] We find for the reasons stated above, that a reasonable inference of malice on the part of FIS can be safely made. This malice would have thus rebutted any defence of qualified privilege, even if FIS was successful in proving its immunity (see *Adam v Ward* [1917] AC 309).

[35] It may be well worth repeating the two branches of the rule when qualified privilege may arise as enunciated in *Toogood v Spyring*. The first branch states that the communication may be privileged because it is made '*in the discharge of some public or private duty*, whether legal or moral', or because it is made by a person 'in the conduct of his own affairs in matters where his interest is concerned'. (Emphasis added.)

The second branch, as elaborated by in the judgment of Lord Esher MR in *Hunt v Great Northern Railway Company* [1891] 2 QB 189 states that:

> The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and *those to whom it was made had a corresponding interest in having it made to them*. (Emphasis added.)

Baron Parke in *Toogood v Spyring* also made this concluding statement after expounding the abovestated duty/interest rule:

> If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

(See also: *Rajagopal v Rajan* [1972] 1 MLJ 45).

[36] Thus, whether a particular occasion is or is not privileged must be settled by applying the general principles to the facts and circumstances of each

A case (see also *Howe and McColough v Lees*). In our considered view, and having dissected the facts, FIS failed to pass these tests as laid down in *Toogood v Spyring* as adopted in *Macintosh* to claim that privilege for its false publication. In fact there is no question of a duty to communicate arising because FIS did it for profit. Isaacs J's in his dissenting judgment, (with which we agree) in *Howe and McColough* said:

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> The essence of the social or moral duty is that its creation is not voluntary. It does not arise by reason of an agreement on the part of the individual; it is one imposed on him, without his will, and *either by the law or by the general sense of the community* ... But, whether it is a case of a general commercial agency, as in *Macintosh v Dun*, or a case of an association of traders, as here, the position is different where the source of the obligation is purely voluntary. (Emphasis added.)

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(See also the *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393).

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[37] Ultimately the court will have 'to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so' (per Earl Loreburn in *Adam v Ward*).

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F **[38]** We are therefore in agreement with the submission of the respondent's counsel that there was no evidence adduced by FIS that it was under a legal, social and moral duty to incorporate itself to provide the credit information.

[39] FIS's sole witness in fact testified that it was set up for a commercial purpose namely 'to prevent multiple financing of vehicles and titles of vehicles which are tainted. It is to prevent commercial losses to its subscribers'.

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[40] That witness further admitted that FIS 'reserves its absolute right to refuse to supply information to the member at its sole and absolute discretion'. And FIS is not obliged to provide a reason or explanation for such refusal. In our considered view, FIS's duty to its subscribers arose under their mutual agreement, and that duty in our view, is purely voluntary.

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[41] The submission by learned counsel for FIS that its publication is protected by privilege is clearly premised on a wrong assumption namely that since it had incorporated itself into a company where it is under a duty to provide information to its members it must necessarily be protected by privilege because it has an obligation under their agreement to provide such information for the protection of their mutual trading interest. Shortly put, it

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has not passed the duty/interest test in *Toogood*.

[42] We need to say a few words on *London Association for Protection of Trade and another v Greenlands, Limited* [1916] 2 AC 15, on which learned counsel heavily relied. He argued that the Court of Appeal was wrong in not following it, since that case was diametrically opposed to *Macintosh*. Learned counsel for FIS strongly urged us to follow *Greenlands* and ignore *Macintosh.* We have thoroughly discerned *Greenlands* and can only say respectfully that learned counsel had misconstrued its ratio.

[43] The facts in *Greenlands* show that the appellant, the London Association for Protection of Trade (LAPT) was an unincorporated body (a mere association) of over 6,000 members who paid an annual subscription to be members. LAPT did not trade for profit but charge a small fee for information on the credit standing of any trading company. A member of LAPT had made an inquiry on Greenlands and LAPT's secretary gave information which turned out to be false and defamatory. The source of that information was one Wilmshurst, a commercial agent and debt collector and who himself had been made a bankrupt. The secretary of LAPT supplied that information to the member. The information was held to be a false reflection on the respondents' credit. The appellants pleaded that the libel was made on a privileged occasion and without any actual malice. The Court of Appeal rejected that defence. On further appeal and in the course of the argument before the House of Lords, and upon the intimation of Their Lordships, the respondents agreed that the action could not be maintained against an unincorporated association and consented that the judgment obtained by them against LAPT be set aside. The Lord Chancellor said that since LAPT was unincorporated it could not be made a defendant in any capacity whatever. Also, as an entity it could neither publish nor authorise the publication of the libel in issue. Wilmshurst, the information supplier, was not a member of LAPT and since he was not responsible for publishing the libel which was the subject of the action against the respondents, he was held to be not guilty of that libel. Wilmshurst however was found guilty of malice and judgment was entered against him. The judgments against LAPT and its secretary were set aside by consent on a technical matter and for want of jurisdiction. It was also found that the secretary of LAPT was not guilty of any malice. The House however proceeded to consider the question of privilege.

[44] *Greenlands* did not lay down any new principles to regulate an action for defamation, nor any on the issue of qualified privilege. It also does not, as was wrongly submitted by learned counsel for FIS, run diametrical to *Macintosh*. The ratio decidendi of *Greenlands* which distinguished *Macintosh* can be found in this passage of Lord Buckmaster LC which we now quote:

> It (*Macintosh v Dun*) was decided that such a communication was not made in

A discharge either of a public or a private duty, and was not warranted by any reasonable occasion or exigency. That decision leaves untouched the wider question as to whether groups of people, however large, may not combine together in order to provide the necessary information for carrying on business. They can themselves control, through their committee, the person by whom the inquiries are made and
B the method by which such inquiries are conducted, and they obviously have an interest in not receiving inaccurate and misleading statements, for no man in trade is desirous to avoid entering into a profitable trade transaction; his only interest is to render himself secure by the disclosure of trustworthy information.

C **[45]** Lord Buckmaster LC then went on to hold that:

I do not think that *Macintosh v Dun* affects the consideration of this case, beyond showing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no.

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[46] The Lord Chancellor also opined that the fact that the (false) information was capable of being corrected by reference to the Registrar of Companies, and that that was not done, was relevant to the question of malice.

E **[47]** And Earl Loreburn in his judgment said (p 28):

The law was established long ago in *Toogood v Spyring* 1 CM & R 181, and its application was illustrated in the case before the Privy Council of *Macintosh v Dun* [1980] AC 390. That case is of equal authority with our own, and I think it shows
F that considerations of public policy must influence a Court in deciding these questions of privilege.

[48] In the same vein, Lord Atkinson in his judgment (p 33) said:

I shall not attempt to hazard a new definition or description of a privileged occasion.
G I do not think that the statements as to what constitutes a privileged occasion made by Parke B in *Toogood v Spyring* (1834) 1 Cr M & R 181, by Erle CJ in *Whiteley v Adams* (15 CB [NS] 392, 414), by Lord Campbell in *Harrison v Bush* (5 E & B 344), and by Lindley LJ, as he then was, in *Stuart v Bell* ([1891] 2 QB 341, 347) can be improved upon.

H Later on Lord Atkinson referred to what Blackburn J said on the tests for a privilege occasion in *Davies v Snead* (1870) LR 5 QB 608 in this passage:

Where a person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, then if he, bona fide and without malice, does tell them, it is a privileged communication. But this is only another way of saying
I that where a social or moral duty rests upon a person to tell a thing, and he does tell it, under the circumstances mentioned, it is a privileged communication.

In my view, therefore, it is not enough that the judge should be satisfied in any given case that the publication of the defamatory matter is of service to 'the common convenience and welfare of society,' irrespective of the tests so laid down, of which

this 'common convenience and welfare of society' is the foundation and justification. He must, in addition, be of opinion that these tests have been satisfied before he can rule the occasion privileged. I think this is entirely consistent with the passage in Lord Macnaghten's judgment in *Macintosh v Dun* [1908] AC 390, 399 touching the protection of defamatory communications.

Further on Lord Atkinson was also of the opinion that if LAPT were a body trading for gain in the characters of other people and ready to sell their wares for money to any customer, their sole motive being to gain pecuniary profit for themselves, then they were in the same position as the defendant in *Macintosh* and the occasion of the publication of the libel sued on would not be privileged.

[49] Lord Parker of Waddington in his judgment emphasized that LAPT unlike the defendant in *Macintosh* 'is not a body corporate, nor is it a partnership nor is it a creation of statute'.

[50] From the passages of all the Law Lords we have quoted above, it is clear that the opinion in *Macintosh* is not at variance with that in *Greenlands* or, with respect, as mistakenly suggested by learned counsel for FIS, diametrically opposed to the latter. The same tests for the occasion of qualified privilege as enunciated in *Toogood* were applied in these two cases. At most the facts in *Macintosh* were distinguished from the facts and circumstances as found in *Greenlands*. As regards the test for privilege, there was no divergent opinions in both cases. In fact, *Greenlands* followed *Macintosh* on this aspect.

[51] We therefore hold that *Greenlands* need not be considered at all in view of the different facts in the instant appeal.

[52] We thus, conclude that, based on the facts of this case, FIS is nothing more than a credit agency trading for profit. As such it cannot be accorded the immunity of qualified privilege in publishing the defamatory information on the respondent.

[53] The answer to the question posed is thus in the affirmative, in the circumstances of this case.

[54] Before departing we wish to make one observation. *Macintosh* has never been fully considered here before. There is thus a need for us here to clarify the principles governing credit agencies or incorporated bodies trading for profit and the inapplicability of the defence of the common law qualified privilege to them. It is perhaps appropriate in concluding this judgment for us to offer these general cautionary words of advice which we borrow from Isaacs J in his judgment in *Howe and McColough v Lees*:

A It is all very well to advance the interests of the wholesale dealers as a class, and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual. It would be a harsh and tyrannical rule that would protect one person from loss at the pecuniary ruin of another.

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[55] For these reasons, this appeal is dismissed with costs.

Appeal dismissed with costs.

C Reported by Dzulqarnain Ab Fatar

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